

## **Mencap response to DH Consultation on a new adult safeguarding power**

We welcome that the draft Care and Support Bill includes a proposed duty on local authorities to make enquiries where there is a safeguarding concern.

We welcome that the Department of Health is carefully considering whether a new power is required to enable them to carry out this duty, for example, a new power of entry to enable the local authority to speak to someone with mental capacity, where they are concerned the person is experiencing abuse or neglect, and someone else in the property is preventing them from speaking with that person.

Having more powers does carry the risk of undermining rights, but equally, there is no point in having a duty if the local authority is not able to carry it out.

Mencap wants the necessary steps to be taken to ensure that vulnerable adults with a learning disability are protected from abuse. We want it to be the case that when concerns are raised they can be appropriately investigated. An important part of this is going to be that the social worker can access the person in order to speak with them and assess the situation. Access is crucial in order to find out if the person is at risk, whether they are being coerced, and to assess their mental capacity, if not known. Legislation and practice guidance needs to enable this to happen.

### **Do we agree there is a gap in the proposed legislative framework for people with mental capacity, which this power would address?**

It will be care and support professionals who will be able to give the best picture of how legislation translates into practice. They will be able to explain the barriers they face when investigating safeguarding concerns, and where there appear to be gaps in the law which make investigating concerns challenging or impossible.

The potential gap in the law that has been identified by the DH and others, and which the proposed new power would address, is for the situation where:

‘The local authority has reasonable cause for concern that a person with mental capacity is experiencing abuse or neglect, and someone else in the property is preventing the local authority from speaking with that person.’

From the Department of Health paper and Action on Elder Abuse’s earlier consultation paper on the need for powers of entry and intervention in Adult Safeguarding it appears that for situations where the person lacks capacity or has mental health issues or where there is evidence of immediate risk to life and limb, there is existing legislation which would enable the local authority to access the person in this situation, for example, the Mental Capacity Act 2005, the Mental Health Act 1983, the Police and Criminal Evidence Act 1984.

The gap that has been identified is for where someone has mental capacity, does not have mental health issues and where there is no immediate risk to life and limb (see case study on pg 9 of Action on Elder Abuse's paper).

However, there is a view that the proposed new power should cover both people with mental capacity and people who lack capacity. One reason for this is there seems to be a lack of clarity over whether the MCA 2005 does actually allow power of entry to access someone who lacks capacity, where there are safeguarding concerns, and when a third party is preventing access to the home. The Neary case has made it clear that if an LA wants to interfere with family life and remove a person from the family home they need to go to the Court of Protection. It is unclear to us whether the LA could legally enter a person's home in the scenario described, just by citing the MCA 2005 and the 'best interests' principle. If it can, then it would be helpful to have this clarified in the guidance, with a detailed explanation of how the MCA 2005 can be practically used in this scenario.

There are also concerns that having a power specifically for when a person has mental capacity could potentially leave a gap for situations where capacity is not known. There will inevitably be times when the person's capacity is not known and access is needed to do a capacity assessment as well as assess the situation. In such situations it would seem unlikely that entry could be justified in-line with the MCA 2005's 'best interests' principle as this only applies where someone lacks capacity.

Unless these situations can be clarified in the guidance, it would seem to make sense to have the new power covering both people with and without mental capacity.

We know there will be a line of thought that there is no need for a new power as the scenario being discussed in the consultation is probably quite rare, and even when there are no formal statutory powers, the LA does have the option of going to the High Court, which has inherent jurisdiction to act and authorise intervention. However, we agree with the reasons the DH gives in the consultation paper as to why it is not a satisfactory solution to just leave cases to be resolved on a case-by-case basis using the Court's inherent jurisdiction, eg. it could increase the caseload of courts, result in differing outcomes, be expensive for LAs and is likely to be disempowering for individuals.

## **What are our views on the proposed new power of entry?**

There are valid concerns that a new power like this could be misused and undermine human rights. However, we also recognise that there are situations where appropriate intervention can be necessary to uphold a vulnerable person's human rights. This point is backed up by recent case law (local authority and others v DL 28<sup>th</sup> March 2012 – court of Appeal). We agree with Action on Elder Abuse that '(this judgement) would suggest there is a strong legal argument to be made for powers to gain entry, both where a potential victim is otherwise inaccessible or where they are considered 'under constraint or subject to coercion or undue influence.'

It is crucial that there are robust safeguards in place to ensure intervention is justified and proportionate, and thus human rights are upheld. Providing all the

necessary safeguards are in place, including those that ensure this power is only used as a last resort, then we would support the introduction of a power of entry to enable the local authority to speak to someone who they think could be at risk of abuse and neglect, when someone else in the property is preventing the local authority from speaking with that person. We believe it should cover both those with and without mental capacity unless the guidance can clarify exactly how the MCA 2005 can be used in situations where the person lacks capacity or capacity is not known.

### **Power to access and speak to the person**

The crucial point is to enable the local authority to access the person and speak to them alone in order to assess the situation. We understand that there will need to be the power to enter the property to enable this. However, it needs to be clear that the purpose is to access the person to speak to, it is not about entering someone's house for no good reason. It also needs to be clear that this power is not about over-riding the choices of people who have capacity. The power is just to enable the local authority, where concerns have been raised, to ascertain that people are making their decisions freely. Once they can establish this, it is up to the person what choices they make, if they have capacity. If they don't have capacity then the MCA 2005 will govern what next steps the local authority can take.

The situation will not always be straightforward, and the guidance will need to be clear about what can be done in difficult situations, for example, where the third party won't leave the person alone once access has been gained, where it is unclear if the person finds it difficult to communicate or is unwilling to communicate and hence it is difficult to assess capacity.

### **Importance of it being a last resort, and not being seen as a solution in itself**

It needs to be ensured within the Regulation that local authorities use the power proportionately and after full enquiry. It is crucial that this power is only used as a last resort. We have heard people say that it shouldn't be needed and that 'good social work can get you through the door'. It is always going to be better if a social worker can avoid using a power like this and work to maintain a good relationship with an individual and their family/ people they live with. They should always attempt to access the person in other ways first, for example, they could try and get support from the GP or local voluntary organisations. Good practice around this should be detailed in the guidance. It is only when all other options are exhausted that using the power should be considered. The principle should always be to use the least force possible. To start with it would probably be most helpful if the local authority doesn't even mention the power, then it could be used as a bargaining chip, and only as a last resort actually used.

It must be flagged up that just because you manage to access the person using this power, doesn't mean the person will tell you anything. Accessing a person using well-developed social work negotiating skills is going to be much more useful, as it will help build trust, and make it more likely that there is an open exchange which is likely to result in a better outcome for the individual. Using the power could lead to a total breakdown in trust between the LA and the individual and their family/ people they live with. It could make things worse for the individual in the short-term, as the third party may blame them for the intervention. It could also make things worse in the long-term, as they may distance themselves even further from outside help. The

consequences of intervening have to be carefully considered and the risks and benefits weighed up.

It is important that consideration of use of the power, use of the power, and what happens after the power has been used in a situation, is kept track of and that this is an important part of the Safeguarding Adults Board's strategy. There may be a situation where there are concerns that a person with a learning disability may be being bullied by a 'friend' who has moved into their home. As a last resort, a social worker may use the new power to gain access to speak to the person. When they do they may be concerned about the situation, but because the person says they are happy with the situation and want it to remain as it is, and they have capacity to make this decision, then the social worker would need to respect this decision. However, it is important that this is not then considered the end of the matter in relation to safeguarding responsibilities. It is important that this person remains on the radar of the agencies involved in safeguarding and further concerns are investigated properly. This illustrates why it would be much more beneficial to spend time trying to access and speak to the person through other community channels as building a relationship with the person is likely to mean they are less cut off from outside support and help.

### **Power needs to include advocacy and support for the individual**

It is important that hand-in-hand with use of this power is the requirement to provide appropriate support for the individual. Both support during the time when the local authority enters the property to speak to them, and possible support that could be needed as a consequence of the intervention. We believe that an independent advocate should be involved in a situation where the local authority uses the power to enter the property. It could be very confusing for the individual and it is important there is someone there who can support the individual, and who understands the individual's means of communication. It is important that an advocate skilled in working with people with learning disabilities is used, if the individual is known or suspected to have a learning disability. All eventualities will need to be carefully planned for. For example, it may be that the person says they do want to leave, in which case there must be support available to facilitate this.

Speaking with the person is going to be a very important opportunity to explain what information and support is available to the person and what their options may be if they do want to leave their current situation or make changes. It is important the social worker and advocate have prepared carefully and can explain this in an accessible way.

### **Safeguards to ensure that local authorities use such a power effectively and appropriately**

We agree it is very important that there are robust safeguards to ensure the intervention is justified and appropriate.

We believe that when a local authority wants to use this power it should have to apply for a warrant from a Senior judge with experience in human rights and capacity cases eg. a nominated judge of the Court of Protection.

We agree that the local authority should be required to present the court with evidence of the need for the warrant. The local authority should be required to demonstrate what they have done to try to access and speak to the person, and show that they have exhausted all other options and this is a last resort. They should explain what support and advocacy they will put in place to support the person, during the intervention, and they will also need to demonstrate that they have planned for all outcomes of the intervention, and that the vulnerable person's needs and rights are at the centre of this.

The guidance should set out what evidence the local authority will need to provide. Whilst we don't want the process to be overly bureaucratic, we want to make sure that a local authority will only be able to obtain a warrant when it is genuinely being requested as a last resort.

We would want there to be a clear complaints process for the individual's family, or the individual to follow, if they want to complain about how the power has been used.

There should be information provided by the LA about the new power and its use. This should help avoid the need for the power, as if people understand that it is there, they will hopefully be more willing to allow access to a vulnerable person, to enable the local authority to speak to them.

We would want information about the use of the power to be published by the local Safeguarding Adults Board. We would want this information to be collated nationally and scrutinised, so that if there are areas where it appears the power may be being misused, then this can be addressed.

## **Summary of key points**

- 1.** It appears there may be a gap in legislation. We would support the introduction of a new power, as described. However, we believe it should cover both those with and without mental capacity unless the guidance can clarify exactly how the MCA 2005 can be used in situations where the person lacks capacity or capacity is not known.
- 2.** It needs to be ensured within the Regulation that local authorities use the power proportionately and after full enquiry. It is important that the power is only used as a last resort.
- 3.** The power needs to include advocacy and support for the individual
- 4.** There must be robust safeguards to ensure that local authorities use such a power effectively and appropriately.